UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

RADNET MANAGEMENT, INC.	:	21-RC-226166
	:	Unit I: West Coast
	:	Radiology – South Coast
and	:	
	:	
NATIONAL UNION OF HEALTHCARE WORKERS	:	
	:	
	:	

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR FOR REGION 21's OCTOBER 10, 2018 DECISION AND DIRECTION OF ELECTION AND FEBRUARY 19, 2019 DECISION ON OBJECTIONS AND NOTICE OF HEARING

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By and through the Undersigned Counsel, RadNet Management, Inc. (hereafter, the "Employer") hereby submits this Request for Review of the October 10, 2018 Decision and Direction of Election (hereafter, the "Election Decision") and February 19, 2019 Decision and Notice of Hearing (hereafter, the "Objections Decision") issued in the above-referenced case by Regional Director for Region 21 of the National Labor Relations Board, William B. Cowen (hereafter, the "Regional Director").

Summary of Proceedings

The Representation Case Hearing

On August 23, 2018, a petition was filed by the National Union of Healthcare Workers (hereafter, the "Union" or the "NUHW") with the National Labor Relations Board (hereafter, the "Board"), seeking to represent certain employees in a multi-facility unit comprised of fifteen facilities in Orange County, California that are operated by the Employer. Election Decision 1-3. [1] In

[1] References to exhibits from the representation hearing shall be indicated as "E. Ex. ___", "GC Ex. ___", and "U Ex. ___". References to the transcript from the first and second days of the representation hearing shall be indicated as "1Tr. ___" and "2Tr. ___", respectively. References to the Employer's Post-Hearing Brief shall be indicated as "PHB ___". References to the Regional Director's Election Decision shall be indicated "Election Decision ___". References to the Employer's Objections shall be indicated "Objections ___." References to the Employer's Offer of Proof in support of Objections shall be indicated "Offer of Proof ___". References to the Regional Director's Objections Decision shall be indicated as "Objections Decision ___".

response to the Union's Petition for Election, the Employer timely filed a Statement of Position with Region 21 of the Board, asserting that the Union's proposed multi-facility unit was inappropriate, and that the facilities included in the proposed multi-facility unit should constitute single-facility units. Election Decision 3. Next, the Employer argued that employees in some of the job classifications that the Union sought to represent [2] were guards within the meaning of §9(b)(3) of the National Labor Relations Act (hereafter, the "Act"), and therefore that the Union's petition had to be dismissed. Election Decision 3. Finally, the Employer argued that the Board's revised election rules violated law and public policy, and therefore that the Union's petition, which was processed pursuant to the Board's revised election rules, should be dismissed. Election Decision 3-4.

Thereafter, a pre-election hearing was held on August 31, 2018 and September 4, 2018 before a Hearing Officer of the Board, in order to litigate the issues raised by the Employer's Statement of Position. Election Decision 4. During the hearing, the Regional Director requested that the Employer make an offer of proof regarding its evidence in support of its challenges to the Board's

[2] Specifically, the Employer asserted that the employees in the job classification of Lead MRI Technologist, MRI Technologist, Nuclear Medicine Technologist, Nuclear Medicine / PET Technologist, and two, specific employees in the job classification of Multi-Modality Technologists, were guards, as defined by §9(b)(3) of the Act. Election Decision 3.

revised election rules. 1Tr. 24-25. Upon receiving the Employer's offer of proof, the Regional Director declined to permit litigation of the Employer's challenges to the Board's revised election rules "because the Board ha[d] already considered and rejected such arguments". 1Tr. 24-25, 40-42; Election Decision 17.

Evidence of Guard Status

To support the contention made in its Statement of Position, and articulated at the hearing on the Union's Petition, that MRI Technologists (hereafter, including Lead MRI Technologists and two Multi-Modality Technologists who perform MRI procedures) serve as guards within the meaning of §9(b)(3) of the Act, the Employer presented testimony from Dr. Hiendrick Vartani, who has served as the Medical and Health Physicist for all of RadNet's California operations for the past eighteen years. 2Tr. 79-80. [3]

MRI is an acronym for Magnetic Resonance Imaging. 2Tr. 83. Within each Employer facility that offers MRI procedures, the MRI procedures are performed in a separate MRI suite within the facility. 2Tr. 85. The MRI suite includes the room where the MRI machine itself is located (referred to as "Zone Four"), the room where the MRI Technologists sit while performing the imaging (referred to

[3] During the hearing, the Union did not call any witnesses to rebut the testimony offered by Dr. Vartani concerning the obligations, responsibilities, or roles of the MRI Technologist. See, *generally,* 1Tr. and 2Tr. This was true despite the fact that, throughout the course of the hearing, the Union had called four MRI Technologists to testify about their work. Id.

as “Zone Three”), and may additionally include a waiting room and / or an exterior hallway (potentially referred to as Zone Two or Zone One, depending upon how many doors separate those areas from Zone Four). 2Tr. 85, 87, 89, 91; E. Ex. 3. The four “Zones” delineate or indicate the amount and severity of the magnetic force that the MRI machine exerts upon each separate area, with Zone Four possessing the highest levels of magnetic force, and Zone One possessing the lowest levels of magnetic force (but not necessarily *no* magnetic force). 2Tr. 89.

Within Zone Four, the MRI machine itself is primarily composed of a large, powerful magnet (of varying force, depending on the specific MRI equipment possessed by the facility) that is always turned on. 2Tr. 88-89, 90. For this reason, Dr. Vartani explained that, due to the strength of the magnetic forces created by the MRI machine within both Zone Four and Zone Three, these Zones require the highest levels of precaution be taken to avoid adverse consequences related to the potentially destructive magnetic fields emitting from the MRI machine at all times. 2Tr. 89. Because of the strength of the magnetic field in Zone Four, any substance containing metal could be sucked, with great force, into the gantry (the opening where a patient would lie during a procedure) of the MRI machine. 2Tr. 90. Dr. Vartani testified that, if a metal object were to enter Zone Four, the results could be “catastrophic”. 2Tr. 97-98. For example, if a patient entered Zone Four with metal on their person (like metal shavings in their eye) or metal implanted in their

body (like a cardiac stint), the metal could be sucked into the gantry (thereby blinding the individual), or the MRI machine could prevent the metal implant from working properly (in the example of the cardiac stint, by causing severe internal burns to the individual that could cause the individual's organs to shut down). 2Tr. 94, 98, 99-100. Similarly, if a metal object was introduced into Zone Four separate and apart from the body of a patient or individual, that metal object would be sucked into the gantry with potentially serious consequences. 2Tr. 98. Dr. Vartani explained that any metal object introduced into Zone Four would essentially become a "projectile" that would fly through the air toward the gantry. 2Tr. 98. In one RadNet facility, a cleaning crew was erroneously permitted to bring a metal floor buffing machine into Zone Four, and the entire buffing machine was pulled into the gantry. 2Tr. 98. In another example that highlighted the grave potential consequences of introducing metal into Zone Four, Dr. Vartani recalled an incident that had happened at a non-RadNet facility, where a metallic oxygen tank was introduced into Zone Four while a six-year old child was being scanned. 2Tr. 98-99. Because of the strong magnetic forces present, the oxygen tank flew into the gantry while the child was still lying inside the machine, and bludgeoned the child to death. 2Tr. 98-99.

Therefore, as a result of the serious consequences of the introduction of metal into Zones Three and Four, in some facilities in the Union's petitioned-for

unit, the MRI machine, and thus Zone Four, are protected by a cipher lock, to which only the MRI Technologists have the code. 2Tr. 124. In all facilities within the Union's petitioned-for unit, the only facility personnel who are permitted to access Zones Three and Four are the MRI Technologists and the radiologists and physicists who analyze the results of the scans taken by the MRI Technologists. 2Tr. 91. The MRI Technologists at each facility are the *only* personnel tasked with policing the magnetic fields in Zones Three and Four, as set forth in great detail by the MRI Department Manual made available to all MRI Technologists electronically. 2Tr. 95-97; E. Ex. 4; See Also E. Ex. 5 (additional safety criteria which must be met by the MRI Technologists). As a result, the MRI Technologists screen and control the entry of other employees, patients and visitors into Zones Three and Four, and are required to call the police if any individual refuses to obey their directions with regard to entry into those areas. 2Tr. 100-101.

Aside from the strong magnetic forces which it emits, the MRI magnet itself can also be dangerous. Dr. Vartani testified that the MRI magnet must be maintained at a specific temperature, and that if the magnet overheats, it becomes, quite literally, a "bomb" that could explode. 2Tr. 101. The MRI Technologists are the sole personnel at each facility within the petitioned-for unit that offers MRI who are responsible for monitoring and maintaining the temperature of the MRI magnet. 1Tr. 101. If the MRI Technologist is unable to control the temperature of

the MRI magnet, they may have to evacuate the entire facility in order to ensure the safety of facility personnel, visitors and patients. 2Tr. 101. In such circumstances, the only way to prevent the MRI magnet from overheating and exploding may be to "quench" the MRI magnet, which would render the MRI machine inoperable for approximately one week thereafter, and cost the facility approximately $50,000 - $55,000 in lost revenue, thus underscoring the importance of the MRI Technologists' proper monitoring of the MRI magnet's temperature as part of their regular job duties. 2Tr. 113-114. Accordingly, given the multitude of important security and safety functions performed by the MRI Technologists, Dr. Vartani testified that permitting the MRI Technologists employed by RadNet to strike with other technical employees "could be a fatal mistake". 2Tr. 127.

The Regional Director's Decision & Direction of Election

At the conclusion of the representation hearing, the parties submitted post-hearing briefs to the Regional Director. Election Decision 4. On October 10, 2018, the Regional Director issued his Election Decision, in which he concluded that the Union had not met its burden of proof with regard to the community of interest between and amongst the employees of the fifteen facilities it sought to include in a multi-facility bargaining unit. Election Decision 4, 13-16. Therefore, the Regional Director concluded that single-facility units would be the appropriate units for collective bargaining. Election Decision 4, 16. The Regional Director

additionally concluded that the Employer's arguments regarding the "facial validity" of the Board's revised election rules "have been addressed and resolved by the Board the Courts and are therefore not appropriately raised in this proceeding", citing to Pulau Corp., 363 NLRB No. 8 (2015), Chamber of Commerce v. NLRB, 118 F.Supp. 3d 171 (D.D.C. 2015), and Associated Builders & Contractors of Texas v. NLRB, No. 1-15-CV-026 RP (W.D. Tex. June 1, 2015), *affd.* 826 F.3d 215 (5th Cir. 2016). Election Decision 4, 17.

Finally, the Regional Director held that the positions asserted by the Employer to constitute guards, pursuant to §9(b)(3) of the Act, were not guards within the meaning of the Act, and therefore should not be excluded from the single-facility units. Election Decision 4, 17. The Regional Director cited to Wolverine Dispatch, Inc., 321 NLRB 795 (1996) and 55 Liberty Owners Corp., 318 NLRB 308 (1995) for the proposition that "employees who perform guard-like duties that are merely incidental to their other duties are not guards", and determined that the employees at issue were "engaged to perform certain diagnostic testing" – though he acknowledged that the employees did possess responsibility for the "safe operation of the Employer's equipment". Election Decision 16, 17. The Regional Director's Election Decision also relied upon the fact that the MRI Technologists "do not carry weapons, clubs, wear uniforms or badges, or display any other common indicia of guards" and do not sit in a security

booth. Election Decision 16-17. Despite record evidence to the contrary, the Regional Director concluded that MRI Technologists did not receive "specialized instructions on what to do in the event there is a threat to the security of the premises". Election Decision 17. On the basis of his findings the Regional Director determined that the employees at issue could be included in the units petitioned for by the Union. Election Decision 17.

Pursuant to his findings, the Regional Director then directed elections to take place in eleven individual units located at ten of the Employer's facilities [4] in Orange County over the course of two days. Election Decision 18-23. The Regional Director further ordered that, at the conclusion of each election held pursuant to the Election Decision, the ballots from that election would be impounded, and would not be counted until the conclusion of the final polling period at the final election held pursuant to the Election Decision. Election Decision 23. The Regional Director did not cite any authority for his decision to impound the ballots in this manner. See Election Decision.

The Election & The Employer's Objections

[4] Following the conclusion of the representation hearing, the Union notified Region 21 that if elections were directed in single-facility units instead of the petitioned-for multi-facility unit, the Petitioner did not wish to proceed to a single-facility election at five of the facilities that were originally listed on the Union's petition. Election Decision 18, FN 22.

Pursuant to the Regional Director's Election Decision, on October 25, 2018, an election was held at the Employer's West Coast Radiology – South Coast facility in Santa Ana, California during which technical employees voted as to whether or not they wished to be represented for purposes of collective bargaining by the Union. Objections Decision 1. Pursuant to the Regional Director's Election Decision, the ballots from the election were impounded, and were not counted until after the final election was held pursuant to the Election Decision, on October 25, 2018. Election Decision 23. Of approximately three eligible voters, three employees cast ballots in the election, with one employee voting against representation by the Union and two employees voting for representation by the Union. Objections Decision 1. On November 1, 2018, the Employer filed timely Objections to the conduct of the election and conduct affecting the results of the election (hereafter, the "Objections") with Region 21 of the Board, accompanied by an Offer of Proof filed the same day (hereafter, the "Offer of Proof"). Objections; Offer of Proof. [5]

[5] Specifically, the Employer alleged that the results of the October 24, 2018 election should be overturned, because: (1) The election was conducted in violation of §9(b)(3) of the Act, because the unit included guards, as defined by §9(b)(3) of the Act; (2) The Board Agent did not count and tally the ballots at the conclusion of the election, and instead impounded the ballots, in violation of the Board's Rules and Regulations and the Administrative Procedure Act (hereafter, the "APA"), 5 U.S.C. §706; (3) The Board Agents assigned to oversee the other elections conducted pursuant to the Election Decision similarly did not count and tally the ballots at the conclusion of those elections, and instead impounded the

The Regional Director's Decision & Notice of Hearing

Thereafter, on February 19, 2019, the Regional Director issued his Objections Decision, overruling all of the Employer's Objections [6] and issuing a Notice of Hearing for the purpose of receiving information about the subsequent cessation of operations at the West Coast Radiology – South Coast facility. Objections Decision 10. With regard to Objection No. 1, which alleged that the election was conducted in violation of §9(b)(3) of the Act, because the unit included guards, as defined by §9(b)(3) of the Act, the Regional Director held that his Election Decision had "fully considered the record evidence" regarding the guard status of employees, and that on the basis of that evidence, and thus the "substantially [similar]" evidence presented by the Employer's Offer of Proof, the Regional Director had concluded that the employees were not guards within the

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ballots, in violation of §9(b)(3) the Act and Board precedent; (4) The Board Agents assigned to oversee the other elections conducted pursuant to the Election Decision did not count and tally the ballots at the conclusion of those elections, and instead impounded the ballots, in violation of §8(c) the Act; (5) The Regional Director treated the elections as a "*de facto* single election", violating the Employer's due process rights and the APA; (6) The Region erred by conducting the election pursuant to the Board's revised elections rules, which violate the Act, the APA, and public policy considerations; and (7) The Union had failed to disclose to eligible voters, and thus materially misrepresented, the Union's affiliation with the International Association of Machinists and Aerospace Workers (hereafter, the "IAMAW"). See Objections; Offer of Proof.

[6] In connection with his discussion of each of the Employer's Objections, the Regional Director noted, "The Petitioner denies the alleged objectionable conduct". Objections Decision 2, 4, 7, 8.

meaning of the Act, and that the evidence would not constitute grounds for setting aside the election. Objections Decision 2.

With regard to Objection Nos. 2-5, which alleged that the Regional Director's decision to impound the ballots from the election, and the Board Agents' subsequent effectuation of the Regional Director's decision in the instant election as well as the other elections in the case, violated the Board's precedent, the Board's Rules and Regulations, the APA, and the Act, the Regional Director first determined that the four Objections were "substantially related", and therefore chose to address all four Objections together. Objections Decision 3. The Regional Director's Objections Decision acknowledged that §102.69 of the Board's Rules and Regulations required that ballots be counted "at the conclusion of the election" and that a tally of ballots should be "immediately made available to the parties." Objections Decision 5. The Regional Director's Objections Decision further admitted that the Board's Casehandling Manual required the count of ballots to "take place as soon as possible after the close of voting." Objections Decision 5. Finally, the Regional Director's Objections Decision cited to Nathan Katz Realty LLC v. NLRB, as an acknowledgement of the limitations on a Regional Director's authority and discretion to impound ballots. 251 F.3d. 981 (D.C. Cir. 2001); Objections Decision 5.

Despite these admissions, the Regional Director did not set a hearing on the Employer's Objections, but instead faulted the Employer for not citing "legal authority or argument" to support its Objections, and cited to his discretion to "deviat[e] from the typical practice" in such "highly unusual circumstances", in part in the interest of "administrative efficiency". Objections Decision 5; FN 3. The Regional Director cited to Independent Rice Mill, a sixty-three-year-old Board decision, in support of his decision to impound ballots in the case at bar pursuant to a "similar rationale". 111 NLRB 536 (1955); Objections Decision 6. In support of his decision to impound the ballots in the elections held pursuant to the Election Decision, the Regional Director additionally lauded the fact that "*no one* [...] would know the outcome of *any* of the earlier elections" and therefore no one "could disseminate any information about the results of any of the elections until after all the elections were concluded." Objections Decision 6 (emphasis in original). Finally, the Regional Director stated that his decision to impound the ballots was based on a desire to avoid "the potential for [...] information to be disseminated in an objectionable manner by either of the parties or its agents." Objections Decision 7. On the basis of this analysis, the Regional Director overruled Objections 2-5. Objections Decision 7.

With regard to Objection No. 6, which alleged that the Board had erred by conducting the election pursuant to the Board's revised election rules, which the

Employer alleged violated the Act, the APA, and public policy considerations underlying a number of other federal statutes, the Regional Director held that, because the Board had "already considered and rejected" the Employer's challenges to the validity of the Board's revised election rules, the Objection "would not constitute grounds for setting aside the election", and thus overruled Objection No. 6. Objections Decision 7. Finally, in connection with Objection No. 7, concerning the Union's failure to disclose its affiliation with the IAMAW to eligible voters, despite acknowledging the Board's responsibility to ascertain that employees "know the identity of the organization that they were voting for or against", the Regional Director held that the Employer "failed to establish any evidence to support a misrepresentation by the Petitioner that would provide grounds for setting aside the election", and thus overruled Objection No. 7. Objections Decision 8-9. Having overruled all of the Employer's Objections, the Regional Director then issued a Notice of Hearing for the purpose of receiving information about the subsequent cessation of operations at the West Coast Radiology – South Coast facility. Objections Decision 10.

Summary of Argument

As an initial matter, the Union's Petition should have been dismissed by the Regional Director, because the Board's revised election rules violate public policy and various federal statutes, including the APA and the Act. Alternatively, the

Union's Petition should have been dismissed by the Regional Director, because the Petition sought to include, in a unit with non-guard employees, MRI Technologists and who constitute guards within the meaning of §9(b)(3) of the Act, in clear violation of the express language of §9(b)(3) of the Act. However, even if the Board finds that the Regional Director did not err in issuing his Election Decision and thereafter, his Objections Decision, without dismissing the Union's Petition, the Board should still overrule the Regional Director's Objections Decision, and remand the case to the Region so that a hearing on the Employer's Objections can be convened, so that the Employer is granted an opportunity to litigate issues related to the conduct of the election, as well as conduct affecting the election, and so the election may be set aside.

Argument

The Board's Revised Election Rules

The Regional Director first erred in this case by failing to dismiss the Union's Petition, which was filed and processed pursuant to the Board's revised election rules, on the grounds that the Board's revised election rules violate the Employer's rights, public policy, the APA, the Board's statutory authority under the Act, and Sections 7, 8(c), and 9(b) of the Act. Section 9 of the Act requires the Board to resolve questions concerning representation, and sets forth the basic steps of that process, including the requirement that the Board investigate any petition

filed, and provide "for an appropriate hearing upon due notice." 29 U.S.C. §159(c)(1). Section 9(b) of the Act further requires the Board, *in each case*, to determine the appropriate bargaining unit, "in order to ensure employees the fullest freedom in exercising the rights guaranteed by the Act." 29 U.S.C. §159(b) (emphasis added). The Board's revised election rules violate these requirements, because the revised rules circumvent the Board's obligation to hold, and an employer's right to be heard at, a hearing on questions concerning representation, such as the voter eligibility issues that the Board now largely defers. Indeed, the clear language of the legislative history underlying the passage of Act, as well as the Board's past precedent, both expressly support this reading of the Act. See, Barre-National, Inc., 316 NLRB 877 (1995). By refusing employers a full opportunity to be heard at a pre-election hearing, the Board's revised election rules violate Section 9(b) of the Act, and therefore constitute an impermissible interpretation of the Act by the Board.

The Board's revised election rules also violate Sections 7 and 8(c) of the Act by restricting employee and employer free speech during a union's organizing campaign. By substantially shortening the electioneering period between the filing of a petition by a union, and the date of an election, the Board's revised rules have the cumulative effect of curtailing the employee and employer free speech envisioned by Sections 7 and 8(c) of the Act. These Sections of the Act are

intended to protect the rights of employees and employers to engage in "uninhibited, robust, and wide open debate in labor disputes." Chamber of Commerce of U.S. v. Brown, 544 U.S. 60, 67-68 (2008). 29 U.S.C. §§157, 158(c). These goals are not only not achieved, but actively prevented, by the Board's drastic shortening of the campaign period, which fails to allocate any time for the kind of meaningful free speech during a union's organizing campaign envisioned by Sections 7 and 8(c) of the Act.

Furthermore, the requirements set forth by the Board's revised election rules, which require employers, including the Employer in the instant case, to share an expanded amount of private employee information, such as their hours of work, work locations, emails, and telephone numbers, with the union, both before and after the pre-election hearing, violate federal privacy law and public policy. The revised rules' broader disclosure requirements are additionally arbitrary and capricious, and thus violate the APA. In the years since the Board decided Excelsior Underwear, 156 NLRB 1236 (1966), which required employers to provide unions with significantly more limited information about employees within the union's petitioned-for unit than the Board's revised rules, public policy has supported increased protection of employee privacy, rather than decreased

protection of privacy. [7] Therefore, the Board's revised election rules run counter to public policy, and also run afoul of the APA's requirement that changes to the Board's rules not be arbitrary or capricious. The Board's revised election rules are arbitrary and capricious, inasmuch as they disregard employees' legitimate interests in privacy, expose employees to greater threat of union intimidation and harassment, and impose a substantial burden on employers expected to collect, maintain and disseminate the now-longer list of required information in a shorter period of time.

Finally, the Board's revised election rules additionally violate the APA because the Board's decision to suddenly and drastically change the manner in which representation cases are handled by the Board was, in and of itself, unlawfully arbitrary and capricious. In promulgating the revised election rules, the Board relied heavily on factors not considered relevant to representation cases by Congress when it wrote the Act, such as speed in scheduling elections, and the facilitation of organized labor. Similarly, the Board's revised election rules fail to account for delays that will be caused later in the representation case proceedings, caused by blocking charges and increased post-election challenges caused by the procedure set forth by the Board's revised rules. Because such procedural

[7] This shift in public policy is evidenced by more recent federal legislation, including the federal Privacy Act, the privacy exemption contained in the Freedom of Information Act, the Telemarketing and Consumer Fraud Abuse Prevention Act, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act.

obstacles will still delay representation proceedings, the Board's revised election rules are rendered ineffective and arbitrary, and thus for this additional reason, violate the APA. Accordingly, for all of these reasons, the Board's revised election rules should be rescinded, and the Union's Petition, which was filed and processed pursuant to the Board's revised election rules, should be dismissed.

In connection with the Employer's objections to the Board's conduct of the election pursuant to the Board's revised election rules, the Regional Director held that the Employer's stated objections to the Board's revised election rules did not constitute grounds for dismissing the Union's Petition or setting aside the election. Election Decision 17; Objections Decision 7. Furthermore, the Regional Director erroneously claimed that the Board had "already considered and rejected" the Employer's challenges to the validity of the Board's revised election rules. Election Decision 17; Objections Decision 7. The Regional Director's claim that the Board has already considered the Employer's objections to the Board's revised election rules is not accurate, inasmuch as the cases cited by the Regional Director in his Election Decision did not foreclose the possibility that the Board's revised election rules might be invalid *as applied in future cases*, and in particular, the instant case. See Associated Builders & Contractors of Texas, Inc. v. NLRB, No. 1-15-CV-026 RP, 2015 WL 3609116; Chamber of Commerce of the United States

v. NLRB, 118 F.Supp.3d. 171 (D.D.C. 2015). Palau Corp., 363 NLRB No. 8 (2015).

As the Employer's Offer of Proof made clear, the Employer's Objection raised not only the facial invalidity of the Board's revised election roles, but also set forth the Employer's intention to challenge the Board's revised election rules as applied in the case at bar. Offer of Proof 4. The Employer's Offer of Proof illustrated that the inclusion of personal, private information on the voter list that the Board's revised election rules required the Employer to provide the Union violated the privacy rights of the employees in the petitioned-for units. Offer of Proof 4. Thus, contrary to the Regional Director's ruling, the Employer's specific, "as-applied" challenges were in no way discussed, never mind foreclosed, by the precedent cited in Election Decision, and relied upon in his Objections Decision.

Furthermore, the Regional Director's analysis, and his conclusion in the Objections Decision, that the Employer's challenge to the Board's revised election rules would not be grounds upon which to set aside the election, ignore the Board's request for information from the public regarding the Board's revised election rules, with specific focus on whether the revised election rules should be maintained, modified, or rescinded in their entirety. 29 CFR §§101, 102, RIN 3142-AA12. The Board's request for information raises the Board's concerns with the "significant issues concerning application" of the Board's revised rules that

have arisen over the course of the two years during which the revised election rules have been in place, illustrating that the Board itself is still considering whether the Board's revised election rules are appropriate and lawful – very likely for all of the reasons enumerated by the Employer in the instant filing, in its Objections, and in its Post-Hearing Brief to the Regional Director. Id. at 2. Accordingly, the Regional Director's perfunctory dismissal of the Employer's challenges to the validity of the Board's revised election rules, as though they raised no cognizable argument, cannot stand. The Employer should be presented with a full and fair opportunity to present its arguments regarding the legal issues confronting the Board's revised election rules, both on their face and as applied in the case at bar, to the Region and to the Board, and the Board's revised election rules should be set aside.

Employees' Guard Status

Next, the Regional Director erred by concluding in his Election Decision, and affirming in his Objections Decision, that the Employer's MRI Technologists were not guards, as defined by §9(b)(3) of the Act. Pursuant to §9(b)(3) of the Act, the Board is expressly precluded from approving or certifying any bargaining unit that includes, together with other employees, "any individual employed as a guard", and the Board's processes may not be used "in furtherance of that end". 29 U.S.C. §159(b)(3); Brink's, Inc., 272 NLRB 868, 869 (1985); University of

Chicago, 272 NLRB 873, 875 (1984) ("[W]e shall not, indeed cannot, sanction a practice which utilizes Board processes in furtherance of an end which a specific provision of the Act was plainly intended to discourage."). Section 9(b)(3) of the Act defines a "guard" as an "individual employed to enforce against employees and other persons rules to protect the property of the employer or to protect the safety of persons on the employer's property." 29 U.S.C. §159(b)(3); See Also, Petroleum Chemicals, Inc., 121 NLEB 630 (1958).

Pursuant to long-standing Board precedent, employees who are guards may also possess non-guard job duties that they perform on a daily basis. See Brinks, Inc., 272 NLRB at 868-869 (Coin room operators, who possessed other job duties beyond their guard functions, still met the definition of "guard" set forth by Section 9(b)(3) of the Act); Reynolds Metal Co., 198 NLRB 120 (1972) (Firefighters found to be guards even if only approximately 25% of their time on duty is spent performing guard duties); Wackenhut Corp., 196 NLRB 278 (1972) (Security toll operators were found to be guards, despite the fact that they had other job duties outside their guard functions). The Courts, the Board and the Board's Regional Directors have all recognized that "guards", as defined by the Act, may encompass many, varying job classifications beyond typical security personnel, and have not historically been limited to "security guards" in the traditional sense. See Id.; See Also, Bellagio, LLC v. NLRB, 863 F.3d 839 (D.C. Cir. 2018), Wright

Memorial Hospital, 255 NLRB 1319 (1980); Jakel Motors, 288 NLRB 730 (1988); West Virginia Pulp & Paper, 140 NLRB 1160 (1963); A.W. Schlesinger Geriatric Center, 267 NLRB 1363 (1983); Crossroads Community Correctional Center, 308 NLRB 558 (1992); Wackenhut Corp., 196 NLRB 278 (1972); DTG Operations, Inc., 31-RC-175375 (June 2, 2016) (Exit Gate Agents employed by Dollar Thrifty, a car rental company, were guards, pursuant to §9(b)(3) of the Act).[8]

In analyzing whether employees function as guards for the purposes of §9(b)(3) of the Act, the Board looks to the "specific and primary" responsibilities of the employee in the employer's workplace. Lion Country Safari, 225 NLRB 969 (1976); Reynolds Metal Co., 198 NLRB 120 (1972). For example, the Board has held that, where the enforcement of company safety rules is a "continued" and "significant" portion of the requirements of an employee's job, the employee may classify as a guard for purposes of Section 9(b)(3) of the Act. Reynolds Metal Co., 198 NLRB 120 (1972); Wackenhut Corp., 196 NLRB 278 (1972). Similarly, employees' responsibility to make rounds, enforce safety rules, and prevent unauthorized individuals from entering certain areas of the employer's property

[8] Also notable is the fact that, as in the case at bar, the evidence before the Regional Director in DTG Operations, Inc. illustrated that Exit Gate Agents possessed job duties that had nothing to do with their guard functions, such as tracking vehicle inventory and selling upgrades to customers. Id. at 5. The evidence further illustrated that the Exit Gate Agents did not complete security rounds, did not carry weapons, possessed no special identification as security personnel, and were not expected to use physical force to carry out any security functions of their jobs. Id. at 6.

have been found to establish guard status by the Board. Jakel Motors, 288 NLRB 730 (1988); West Virginia Pulp & Paper, 140 NLRB 1160 (1963). As noted above, the fact that employees may have other, "non-guard" job duties does not necessarily disqualify employees as guards for the purposes of the Board's analysis, particularly where those employees are responsible for the "safety of the building and its contents". Watchmanitors, Inc., 128 NLRB 903 (1960); See Also, A.W. Schlesinger Geriatric Center, 267 NLRB 1363 (1983); Wright Memorial Hospital, 255 NLRB 1319 (1980). Furthermore, whether the employees in question wear uniforms or carry weapons, clubs, or handcuffs is not dispositive of the question of whether those employees constitute guards pursuant to the Act. Crossroads Community Correctional Center, 308 NLRB 558 (1992); Thunderbird Hotel, Inc. et. al., 144 NLRB 84 (1963); Allen Services Co., 314 NLRB 1060 (1994). Finally, the Board has found it "immaterial" to the analysis whether the employees at issue are themselves authorized to use force or the "power of police" to compel compliance with the rules set forth for the protection of the employer's property and premises, so long as the employees at issue possessed and exercised the power to observe and report infractions of the employer's safety rules to the appropriate authorities. Wackenhut Corp., 196 NLRB 278 (1972); See Also, Wright Memorial Hospital, 255 NLRB 1319 (1980); MGM Grand Hotel, 274 NLRB 139 (1985); McDonnell Aircraft Co. v. NLRB, 827 F.2d 324, 327 (8th Cir.

1987) (Enforcing an employer's rules to protect property or patrons does not require "personal confrontation.")

In the case at bar, the Regional Director erred by permitting the certification of a unit that includes both guard and non-guard employees. The MRI Technologists' responsibilities to police Zone Four and Zone Three of the MRI suite are continuing and ever-present: the MRI Technologists must not only prevent the introduction of metal into those environments, but must also screen every individual who enters those areas to ensure that they do not internally possess any metal that would interact with the magnetic fields and cause the individual body harm. The MRI Technologists' responsibilities in this regard are also ever-present due to the fact that the MRI magnet is always turned on, meaning that MRI Technologists must be aware of the presence of the magnetic fields, and the correlated dangers they present, at all times. Indeed, a MRI Technologist's failure to properly secure Zone Four and Zone Three could easily result in an individual's severe injury or even death, as testified to by Dr. Vartani. Similarly, the MRI Technologists' duties to police and control the Employer's property – namely the MRI magnet itself, are equally significant and continuous, inasmuch as constant monitoring is required to ensure that the MRI magnet does not explode or does not need to be quenched, which would come at a significant cost to the Employer's business.

The potential consequences of the MRI Technologists' failure to carry out the safety and security functions of their position could result in such catastrophic injury that it is impossible to overstate the significance of the MRI Technologists' essential role in ensuring the safe operation of the MRI machine. Furthermore, the evidence illustrates that, in enforcing the Employer's safety rules, the MRI Technologists carry out some of the very traditional "guard duties", including the prevention of unauthorized individuals from accessing certain areas of the Employer's premises, some of which may be locked, and to which only MRI Technologists have the keycode, and the evacuation of the Employer's facilities, under circumstances where the MRI magnet cannot be cooled and may explode. As recognized by the Board in prior cases, the fact that MRI Technologists are authorized to call the police to remove a trespassing individual from an unsafe area, rather than physically removing the individual themselves, is immaterial to the Board's analysis of guard status. Additionally, Dr. Vartani testified that allowing for the "divided loyalties" of MRI Technologists in the event of a strike, by permitting them to participate in a non-guard unit, "could be a fatal mistake." Finally, it is notable that, despite having access to at least four MRI Technologists who testified on behalf of the Union during the hearing, the Union chose not to call any MRI Technologist to rebut the Employer's substantial evidence of the guard duties encompassed by the role of the MRI Technologist.

Furthermore, contrary to the Regional Director's assertion in his Election Decision, and as addressed in the many prior Board cases cited above, the fact that the MRI Technologists also conduct scans and perform testing of patients while at work does not preclude a finding that the safety and security functions of their jobs render them guards within the meaning of §9(b)(3) of the Act.[9] Similarly, the Regional Director's conclusion that the MRI Technologists do not constitute guards because they do not carry weapons, sit in a security booth, or wear security uniforms or badges, misses the broader and more theoretical criteria commonly espoused by the Board's analysis of guard status, and focuses too narrowly on the traditional concept of the "security guard", which has never been the focus of the analysis by the Board, and is an approach explicitly discredited by the Board in past cases. Finally, the Regional Director's conclusion that MRI Technologists could not constitute guards because they did not receive "specialized instructions on what to do in the event that there is a threat to the security of the premises is

[9] To this end, the Regional Director's citation to Wolverine Dispatch, Inc., 321 NLRB 796 (1996) is inapposite. Wolverine Dispatch involved the question of the addition of two receptionists to an all-guard unit, rather than the subtraction of guard employees from a non-guard unit. This, of course, means that the duties of the receptionists in question were contrasted with duties of the security guards, which greatly alters the comparison. Furthermore, the crux of the employers' arguments as to the guard status of the receptionists in both Wolverine Dispatch and 55 Liberty Owners Corp., 318 NLRB 308 (1995) – also cited by the Regional Director - was that the receptionists controlled access to the employer's front door – far less powerful evidence, and far less voluminous evidence, of guard status than is presented by the instant case.

directly contradicted by the Board's own precedent. In Wackenhut Corp., the Board held it "immaterial" to the guard analysis whether the employees at issue are themselves authorized to use force or the "power of police" to compel compliance with the rules set forth for the protection of the employer's property and premises, so long as the employees at issue possessed and exercised the power to observe and report infractions of the employer's safety rules to the appropriate authorities. Wackenhut Corp., 196 NLRB 278 (1972).

Additionally, the Regional Director's analysis of guard status was flawed, where his conclusions were based upon facts directly contradicted by the record. First, the Regional Director's conclusion that MRI Technologists could not constitute guards because they did not receive "specialized instructions on what to do in the event that there is a threat to the security of the premises is directly contradicted by Dr. Vartani's testimony that MRI Technologists "are the authority" for their modality at their facility, and are not only required to report safety incidents through a chain of command, but may furthermore be given additional safety responsibilities thereafter. See 2Tr. 122. Additionally, the Regional Director's conclusion that employees' safety functions were, in essence, incidental to their roles for the Employer ignores the plethora of evidence about the roles of the MRI Technologists, including the direct quote from Dr. Vartani, that MRI

Technologists "are essential in the safety operations of the MRI unit". See 2Tr. 94. Given these inaccuracies, the Regional Director's Election Decision cannot stand.

The Employer's Remaining Objections

Beyond his failure to dismiss the Union's Petition on the basis of the Employer's objections, raised in both the Employer's Post-Hearing Brief and the Employer's Objections, to the application of the Board's revised election rules, as well as his failure to dismiss the Union's Petition on the basis of the guard status of certain of the Employer's employees, as was also raised in both the Employer's Post-Hearing Brief and the Employer's Objections, the Regional Director further erred by failing to hold a hearing on the Employer's remaining Objections to the October 25, 2018 election and failing to set aside the election. [10]

Objections Nos. 2-5 – Impounding of Ballots

Section 102.69 of the Board's Rules and Regulations requires that ballots be counted "at the conclusion of the election and a tally of ballots prepared and immediately made available to the parties". NLRB Rules §102.69.

[10] As an initial matter, the Regional Director illustrated his own misunderstanding of the Board's objections process, inasmuch as he apparently provided the Union with some form of an opportunity to respond to the Employer's Objections, as made clear by his inclusion of the Petitioner's "denial" of the alleged objectionable conduct in connection with each of the Employer's Objections. Not only is the Union's position on the Employer's Objections an inappropriate inclusion in the Objections Decision, it is furthermore irrelevant – the Regional Director's duty is not to determine which party is "right" about an objection, but rather, to determine whether any conduct occurred during the election, or affecting the election, that might warrant the setting aside of that election.

Furthermore, the Board's Casehandling Manual provides that the count of ballots "should take place as soon as possible after the close of voting". NLRB Casehandling Manual §11340. While the Act permits the Board to delegate the details of elections to the Board's Regional Directors, the Regional Director's authority is far from absolute, and the Regional Director is not authorized to abuse his or her discretion, or act in an arbitrary or capricious manner in violation of the APA. Macmillan Publ'g Co. v. NLRB, 194 F.3d 165 (D.C. Cir. 1999); Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). In Nathan Katz Realty, LLC v. NLRB, 251 F.3d 981 (D.C. Cir. 2001), the Regional Director decided to impound ballots in a multi-facility election, and count the ballots simultaneously, on the grounds that "to count the ballots in both units simultaneously guarantees that neither party will enjoy an unfair advantage over the other". Id. at 993. The employer filed an objection, asserting that the decision to delay part of the ballot count unreasonably deviated from normal Board procedure. Id. at 993-994. The United States Court of Appeals for the District of Columbia Circuit thereafter held that the Regional Director's reasoning for his deviation was insufficient, and remanded the case to the Board for further explanation of how, precisely, counting the ballots in accordance with customary Board procedure would be "unfair". Id. at 994-995.

In the case at bar, the Employer raised four separate and distinct objections to the Regional Director's decision to impound the ballots from the elections arising from the Regional Director's Election Decision, including the instant election on October 25, 2018. [11] First, in Objection No. 2, the Employer objected to the fact that the Regional Director's decision to impound the ballots was, on its face, unsupported by precedent or legal authority, violated the Board's Rules and Regulations, and was thus arbitrary, capricious, and/or discriminatory, in violation of the APA. In response to this argument, the Regional Director acknowledged that he had "exercised his discretion by deviating from the typical practice", but further claimed that his decision was in the best interest of the parties, because it prevented *any* party from knowing the outcome of any election before elections were completed. Objections Decision 6. This of course, is the heart of the Employer's Objection Nos. 3 and 4 – it is the very withholding of this information,

[11] As an initial matter, the Regional Director's failure to separately and independently address the Employer's four Objections in his Objections Decision illustrates a lack of understanding of the separate and distinct violations that each Objection alleged. The Regional Director's decision to address all four Objections as a group underscores the Regional Director's failure to recognize the multifaceted violation he committed when he chose to impound the ballots until the last election had taken place. Furthermore, by compounding and combining his explanation of his decision to overrule the Employer's four distinct Objections, the Regional Director fails to provide a satisfactory rationale for overruling each of the four distinct Objections, and instead provides only a lackluster, surface explanation for his deviation from standard Board procedure and resulting abuse of his discretion.

which the Board's own Rules and Casehandling Manual dictate should be shared immediately, that led to the filing of the Employer's Objections regarding the availability of this information to employees and the Employer. Therefore, the Regional Director's evidence in support of his exercise of his discretion is, in fact, direct evidence that the Employer's Objections should have been sustained. The Regional Director's decision thus violated the Board's clear Rules and precedent, which leave no room for discretion, and thus violated the APA.

The Regional Director also alleged that this case "presented highly unusual circumstances", and that the discretion he exercised "would not constitute grounds for setting aside the election if introduced at a post-election hearing." Objections Decision 6. However, the Regional Director's assertion ignores the limits on his authority – namely, the requirements that he not abuse his discretion, or exercise his discretion in an arbitrary, capricious, or discriminatory fashion. Finally, the Regional Director noted that his decision to impound ballots was made in part on the grounds of "administrative efficiency". Objections Decision 6, FN 3. The Regional Director fails to recognize, however, that due process, equity, and procedural consistency must trump administrative efficiency in his decision-making.

Second, in Objection No. 3, the Employer objected to the fact that the impounding of ballots, as ordered in *all* of the related elections held pursuant to the

Election Decision, separately violated the Act and Board precedent, because it prevented employees of the Employer from voting with full knowledge of the results in other, related bargaining units encompassed by the Regional Director's Election Decision, and thus prevented employees from exercising the fullest freedom in the exercise of their rights. Specifically, the Employer's Offer of Proof demonstrated that at least two employees from the individual bargaining units included in the Election Decision desired to know the outcome of the other elections held pursuant to the Election Decision before casting their votes. Offer of Proof 2-3. In response to the Employer's Objection, the Regional Director cited Independent Rice Mill, a case from 1955, in which the Board found that the Regional Director's decision to impound the ballots was appropriate in a case involving *six separate companies* and the same union, in order to prevent "chain voting" and to avoid disadvantage to any of the six employers or the union. 111 NLRB 536 (1955).

Independent Rice Mill is not only an antiquated Board decision, particularly in light of the D.C. Circuit's more recent ruling in Nathan Katz Realty, but is additionally distinguishable from the case at bar. First, it appears that the six companies involved in the Independent Rice Mill case were part of a multi-employer bargaining unit, in which the votes from all six elections were combined in one tally of ballots. See Independent Rice Mill at 1, *citing* Imperial Rice Mills,

Inc., et. al., 110 NLRB 612 (1954). This fact, of course, entirely changes the analysis of whether the impoundment of ballots was appropriate and logical in Independent Rice Mill, and wholly distinguishes that case from the case at bar, where the facilities voting pursuant to the Regional Director's Election Decision were *explicitly found not to* constitute a multi-facility or multi-employer unit.

Second, the Regional Director's concern with "chain voting" in Independent Rice Mill was not a reasonable ground for concern in the instant case. "Chain voting" is a form of election rigging akin to "stuffing the ballot box" – in other words, adding additional, fraudulent ballots not properly cast by eligible employees to the ballot box in order to affect the outcome of the election. See, Newport News Shipbuilding & Dry Dock Co., 243 NLRB 99, 108 (1979). In order for a concern about a chain voting scheme to be warranted in the instant case, the Regional Director would have to possess some reason to believe that ballots would travel from one ballot box to the other, between and amongst the elections occurring pursuant to the Election Decision. There is no evidence whatsoever to support this alleged concern in the case at bar, inasmuch as the elections took place on different dates, both simultaneously and at different times, and in different geographic locations, miles away from one another. Furthermore, even if the Regional Director's alleged concern about chain voting were reflected by facts in the record, it is unclear how the likelihood of chain voting was decreased by

impounding the ballots. In fact, it seems arguable that the likelihood of chain voting was, if anything, increased by the Regional Director's decision to impound the ballots - if each election's results were tallied immediately after the voting took place, not only would there be fewer elections that could have been impacted by chain voting, but there would be no risk of the impounded ballot boxes being subjected to tampering in connection with a chain voting scheme before the votes were eventually counted. Accordingly, Independent Rice Mill is inapposite, and the Regional Director's rationales for relying upon it must be rejected.

The Regional Director's Objections Decision next attempted to shift blame to the Employer for failing to cite "legal authority or argument to support the assertion that participants involved in a voting unit somehow have a right to know the outcome of an election in another separate voting unit." Objections Decision 5-6. However, the Regional Director's position is both ironic, in light of his own failure to cite any precedent for his decision to impound ballots in his Election Decision in the first instance, and perhaps more importantly, inaccurate. Employer's Objection No. 3 makes clear reference to the Board's obligation to ensure employees' rights to the "fullest freedom" in the exercise of their rights under the Act – an objective set forth by the Act itself, and long espoused by countless Board precedents, including PCC Structurals, which was specifically

cited by the Employer. [12] 29 U.S.C. §159(b); PCC Structurals, Inc., 365 NLRB No. 160 (2017); Labriola Baking Co., 361 NLRB 412 (2014); Western & Southern Life Insurance, 163 NLRB 138 (1967). The Employer's Offer of Proof clearly demonstrated that deviating from Board procedure and denying the employees in this case information about how their colleagues at other facilities of the Employer had voted [13] prevented them from exercising their rights fully and freely, in violation of established Board precedent, and therefore the election should have been set aside.

Finally, the Regional Director claimed that the Employer's Objections created a "paradox", because the Employer had prevailed on its position that a multi-facility bargaining unit was not appropriate, and that single-facility units

[12] The Regional Director recognized that the Employer had, in fact, cited to PCC Structurals, 365 NLRB No. 160 (2017), but dismissed the citation on the grounds that the case "did not stand for the proposition that participants have a right to know the outcome of an election in a separate voting unit." Objections Decision 5, FN 2. However, the Regional Director's facial dismissal of PCC Structurals misses the emphasis and importance that the Board in PCC Structurals placed upon the Board's responsibility to ensure, in every case, that employees were, generally speaking, guaranteed the "fullest freedom" to exercise their rights pursuant to the Act, as would have been achieved in the instant case by tallying the ballots after each election, in compliance with Board procedure.

[13] Contrary to the Regional Director's assertion, no party is claiming that *every* election outcome needed to be known in order for employees to be granted the ability to exercise their rights to the fullest extent possible – rather, the Regional Director simply should have followed the Board's Rules, Casehandling Manual, and precedent in order to make known to all parties involved the results of each election as it occurred.

were instead appropriate. To reach this conclusion, the Regional Director compared apples to oranges, and ignored the reality of the situation, which encompasses a common business structure which is routinely encountered by the Board. While it is true that the Employer - RadNet Management, Inc. - argued that the Union had not proven a sufficient shared community of interest between and amongst the employees of the multi-facility unit it sought to represent to warrant such a unit, this fact does not in any way lead to the conclusion that employees, who are all employed by the same Employer at individual centers, would not perceive themselves as in any way related to employees at other facilities, and would have no cognizable interest in whether their fellow employees chose to be represented to the Union when determining whether they, themselves, wished to be represented by the Union. [14] In other words, the operations of the various facilities included in the Election Decision may be integrated and related, but not so as to render a multi-facility unit for collective bargaining appropriate. Thus, employees could have an interest in knowing how many employees of the Employer had chosen to unionize, but that interest would not establish a community of interest sufficient to support a multi-facility bargaining unit, and vice versa. Because the Regional Director conflated these two points, his logic must be rejected.

[14] To the contrary, the Union's Petition, the Notices of Election, and the very existence of employee witnesses as outlined in the Employer's Offer of Proof all demonstrate that employees in this case were regularly treated as though their interests were interrelated. See Notice of Election; Offer of Proof 2-3.

Next, in Objection No. 4, the Employer objected to the fact that the impounding of the ballots during the Employer's October 24, 2018 prevented the Employer from announcing the results of the election, and thus prevented the Employer from announcing the results of the elections, in violation of the Employer's free speech rights pursuant to §8(c) of the Act. Here too, the Regional Director's claim that the Employer's Objections presented a "paradox" is disproven. As the Employer of all employees voting in each individual unit, RadNet Management, Inc. had a right to know, and communicate as it wished, the results of the elections at all facilities, including the Employer's. As the United States Supreme Court held in Gissel Packing Co. v. NLRB, 395 U.S. 575, 617-618 (1969), §8(c) of the Act guarantees that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by [...] the National Labor Relations Board", and accordingly the Board has recognized that "federal labor policy favors uninhibited, robust and wide open" speech during labor disputes. Franzia Bros. Winery, 290 NLRB 927, 932 (1988), *quoting* Letter Carriers v. Austin, 418 U.S. 264, 270 (1974). By preventing the Employer from communicating with employees about the outcomes of the elections, due to the impounding of the ballots and therefore concealment of the election results in the instant case, the Regional Director violated §8(c) of the Act.

Furthermore, the Regional Director's claim that impounding the ballots in the elections was preferable because it would prevent either the Employer or the Union from engaging in misconduct when announcing the results of the individual elections is highly speculative at best and paternalistic at worst. The Employer asks that the Board take administrative notice of the fact that, prior to the elections in this case, the underlying record contains no evidence of misconduct on the part of the Employer, and the Union did not file any unfair labor practice charges alleging unlawful conduct during the Union's campaign. Furthermore, communication of election results to employees, whether by the Union or the Employer, is not inherently unlawful. There was thus no basis whatsoever for the Regional Director's alleged concern about misconduct. Finally, the Regional Director's desire to prevent speculative harm from occurring, thereby causing actual harm to be done, is illogical, arbitrary, and capricious, in violation of the APA, and thus cannot stand.

Lastly, the Employer objected, in Objection No. 5, to the fact that, despite determining that the various facilities encompassed by the Union's multi-facility Petition properly constituted independent bargaining units, the Regional Director's decision to impound the ballots necessarily treated the elections in those independent bargaining units as though they were one election conducted at multiple locations, thus violating the APA and the Employer's due process rights.

The Regional Director does not address this argument in his Certification Decision, due to his ill-advised decision to combine his analysis of all four of the Employer's Objections. However, it is clear that the Regional Director's actions in this case – impounding the ballots and treating the *separate* elections as though they were instead merely separate polling stations in one election, or a series of election within a multi-facility unit, is deeply problematic. In fact, the Regional Director has actually created a paradox of his own: The decision to impound ballots cuts against his own Election Decision, which found that there was insufficient community of interest amongst employees to sustain a multi-facility unit. The result is an arbitrary, capricious and discriminatory handling of the instant case, which cannot be sustained without violation of the APA. Thus, for all these reasons, the Board should vacate the Objections Decision, order a hearing on the Employer's Objections, and set aside the improperly-conducted elections.

Objection No. 7 – Affiliation With the IAMAW

The Board has long held that it will set aside an election upon a showing that employees did not know the identity of the organization that they were voting for or against. Humane Society for Seattle / King County, 356 NLRB 32, 34-35 (2010); Pacific Southwest Container, 283 NLRB 79, 80 FN2 (2010). In In re. Woods Quality Cabinetry, 340 NLRB 1355 (2003), the Board held that the Region's failure to correct notices of election and ballots that inaccurately reflected

the affiliation of the union warranted the setting aside of the election. The Board held that a question of affiliation "is a material and substantial issue" that has the "potential to significantly impact the employees' choice of bargaining representative." In re. Woods Cabinetry at 1355, *citing* Nelson Chevrolet Co., 156 NLRB 829 (1966); Douglas Aircraft Co., 51 NLRB 161 (1943). Furthermore, the Board cautioned that issues concerning "the very identity of the union" are a "significant matter" – particularly where the affiliation raises questions of assistance from another labor organization, and questions about the "autonomy or dependence" of the union. In re. Woods Cabinetry at 1356.

Despite this precedent, in his Objections Decision, the Regional Director ignored the evidence of a potential affiliation between the Union and the IAMAW illustrated by the Employer's Offer of Proof. See Offer of Proof 5-6. He then concluded, in a prime example of circular logic, that the Employer "failed to establish any evidence to support a misrepresentation by the Petitioner." Objections Decision 7. In support of his assertion that the Employer's Offer of Proof was insufficient to establish an affiliation between the Union and the IAMAW, the Regional Director provided no explanation of the Offer of Proof's insufficiency, and cited to no precedent in support thereof. This omission is glaring, in light of the concrete evidence of affiliation presented by the Employer's Offer of Proof, and paradoxical, where the forum through which the Employer

would have been able to further develop such evidence would have been a hearing on the Employer's Objection. The Regional Director's citation to the fact that only the Union claimed to seek the represent employees, and the fact that only the Union's name appeared on the ballot, does not serve to the ameliorate the problem. In fact, where the Union is substantially affiliated with another labor organization, the fact that the involvement and affiliation of the other labor organization is *itself* the heart of the issue. Thus, the Objections Decision's logic ignores the Employer's Offer of Proof, the Board's procedure, and the Board's precedent.

The Regional Director's inquiry in this case should have focused on the Board's obligation to ensure that employees' votes were not affected by the erroneous designation of the Union as the representative, without any reference to its affiliate, the IAMAW. The question of the Union's affiliation with IAMAW in the instant case contains all the same hallmarks found troubling by the Board in In re. Woods Cabinetry. Due to the Union's failure to disclose the affiliation, and the Board's subsequent failure to conduct an election that recognized and made clear to employees this affiliation, the election should be set aside. The affiliation between the IAMAW and the Union raises all the same questions that the Board found in In re. Woods Cabinetry that employees have the right to address, namely: How does the IAMAW support, or take from, the Union? In what manners is the Union answerable to the IAMAW? How much autonomy, or lack thereof, exists

for the Union as a result of its affiliation with the IAMAW? As a result of the Union's misrepresentation, the resulting conduct of the election by the Board, and the Regional Director's Objections Decision, employees were deprived of this opportunity. Accordingly, Employer's Objection No. 7 should have been set for a full evidentiary hearing, so that evidence of the affiliation between the Union and the IAMAW could have been adduced, and the misrepresentation made by the Union could have been subsequently rectified by setting aside the underlying election.

Conclusion

For all the reasons expressed herein, the Employer respectfully requests that the Board grant the Employer's Request for Review, find that the Board's revised election rules are unlawful, or alternatively that the unit certified violated §9(b)(3) of the Act, and therefore vacate the Election Decision and Objections Decision in this case, and dismiss the Union's underlying Petition. Finally, the Employer respectfully requests, if the Regional Director's Election and Objections Decisions are not vacated on these bases, that the Board vacate the Objections Decision issued by the Regional Director, so that the Employer's Objections may be properly considered, so that the Employer may be granted an opportunity to present a full and fair record regarding its Objections to the October 25, 2018 election, and so that the improper election may be set aside.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

RADNET MANAGEMENT, INC.	:	21-RC-226166
	:	Unit I: West Coast
	:	Radiology – South Coast
and	:	
	:	
NATIONAL UNION OF HEALTHCARE WORKERS	:	
	:	

CERTIFICATE OF SERVICE

The Undersigned, Kaitlin A. Kaseta, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the Employer's Request for Review of the Regional Director for Region 21's October 10, 2018 Decision and Direction of Election and February 19, 2019 Decision on Objections and Notice of Hearing was e-filed with both the Office of the Executive Secretary and Region 21 on this date through the website of the National Labor Relations Board (www.nlrb.gov). The Undersigned does hereby further certify that a copy of the Employer's Request for Review of the Regional Director for Region 21's October 10, 2018 Decision and Direction of Election and February 19, 2019 Decision on Objections and Notice of Hearing were served this date upon the following by email:

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March 12, 2019

Respectfully Submitted,

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